VENUE OF SUITS FOR SPECIFIC PERFORMANCE OF CONTRACTS FOR SALE OF LAND.

In Volume 10 VIRGINIA LAW REGISTER, at page, 283, there is a communication by Mr. A. W. Patterson, of Richmond, Virginia, on the subject of the venue of suits for the specific performance of contracts for the sale of land. The position there taken is that such suits are proceedings strictly *in personam,* and must be brought in the county of the residence of the defendant. Since that communication was written, I have had occasion to brief the authorities on this subject and the conclusion reached was altogether at variance with the opinion of Mr. Patterson.

Briefly, the case is this: A owns land in B county. He makes a contract to sell the same to D who lives in C county. D refuses to comply with the contract and A brings suit in B county wherein the land is for specific performance of the contract, and has process served on D in the county of his residence. A proper plea in abatement to the jurisdiction of the court is duly filed. The question is, has the court jurisdiction?

Section 3214 of Pollard's Code (Sec. 6049 of the Code of 1919), provides that if a suit be *to recover land or subject it to a debt,* it shall be brought in the county wherein the land is. It is clear that a suit for the specific performance of a contract for the sale of land when brought by the vendor is not a suit to recover land. Is it a suit to subject land to a debt? In order to answer this question, it is necessary to consider and determine the nature of such a suit.

In Dunnsmore *v.* Lyle, 87 Va. 391, it was held that in such cases equity looks upon things agreed to be done as actually performed; and that consequently, as soon as a valid contract is made for the sale of real estate, equity considers the buyer as the owner of the land and the seller as a trustee for him; and, on the other hand, it considers the seller as the owner of the money, and the buyer as trustee for him.

In the case of Hanna *v.* Wilson, 3 Gratt. 243, it was held that it was competent for the vendor at any time while he retained the legal title as security for the payment of the purchase money,

to have filed a bill for the specific execution of the contract, and to subject the land to sale, for the purchase money in arrears; and that it was competent for an assignee for value of the note given for the purchase money to file a bill against his assignor, the vendor, and the vendee to enforce the specific execution of the contract, in a case proper for such relief, for his benefit, and to obtain satisfaction of the amount due him by *subjecting the land to sale* for the payment thereof.

In Yancey *v.* Mauck, 15 Gratt. 300, the court said:

> "In Clarke *v.* Hall, 7 Pages Reports 382, it was held that where there is an unexecuted contract for sale of land, that the vendor may file a bill to have specific execution, and then have the land sold for his debt. To the same effect were the cases in this court of Hatcher *v.* Hatcher and Lewis *v.* Caperton, supra, Knisely *v.* Williams, 3 Gratt. 265; Hanna *v.* Wilson, 3 Gratt. 243; Hopkins *v.* Cockrell, 2 Gratt. 88; Burns' Executors *v.* Campbell, 4 Gratt. 125; Stewart's Executors *v.* Abbot, 9 Gratt. 255."

In Ayers *v.* Robins, 30 Gratt. 114, the court held that under a contract for the sale of real estate the vendor is not only entitled, by action at law against the purchaser on the executory contract, to recover the purchase money due, but, said the court:

> "He has the right to subject the land for which the purchase money is owing. He has a lien upon it, which a court of law does not recognize and cannot enforce, and which is recognized and can be enforced only in a court of equity. In the latter forum he is entitled to a personal decree, and at the same time and in the same suit to a further decree for the sale of the land if the personal decree be not satisfied."

In Cole *v.* Withers, 33 Gratt. 194, the vendor sold land by a contract and took a bond for the purchase money. The bond being unpaid, the court held that the vendor was entitled to enforce payment of the bond out of the land. The court there proceeded to inquire whether there is any substantial distinction between a case of the vendor who sells land under a contract to convey, and a vendor who actually conveys the title and retains in his deed an express lien for the payment of the purchase money. In this connection, the court said:

"Upon principle, there ought to be no solid grounds of difference. In both cases parties dealing with the purchaser have notice of the rights of the vendor. In one case, the record shows the title retained as security for the purchase money. In the other, a lien reserved for the same purpose. If, in the one case the character of the debt is not changed, by a change of securities, neither can it be in the other upon the same facts and circumstances. In both cases, *the land stands charged with the purchase money* according to the intention of the parties, and is, *upon natural principles of equity, the necessary fund for its payment.*" (Italics supplied).

No one would be heard to say that a suit to enforce a vendor's lien reserved in the face of a deed could not be brought in the county where the land is situated, without regard to the residence of the defendant. If, upon principle, there is no substantial difference between the lien of a vendor in a contract to convey and a conveyance reserving a vendor's lien, it necessarily follows that a suit to enforce the contract may be brought in the county where the land lay as well as a suit to enforce a vendor's lien, though the defendant reside elsewhere.

In discussing this matter in Cole *v.* Withers, supra, the court compared the case to the lien of a mortgage and expressly held that the land is the natural and primary fund for the payment of the debt.

So, it would seem, that under the very terms of our statute, construing them in the light of the principles governing suits for the specific performance, such a suit, particularly when brought by the vendor, is a suit to subject land to a debt, and that alone ought to be conclusive of the question. These words in the statute were altogether ignored by Mr. Patterson in the article referred to. Indeed, a reference to the article itself will show that in his quotation of the statute Mr. Patterson omitted the words "to subject land to a debt," indicating the omission by a dotted line, and considered the case altogether from the view point of whether the suit was one "to recover land" within the contemplation of the statute.

However, aside from the words "to subject land to a debt" contained in the statute, the court in the county where the land

lay, upon general principles of equity jurisprudence, has jurisdiction over a suit for specific performance brought by the vendor.

In Burrall *v.* Eames, 5 Wis. 360, 362, a suit was commenced in the Circuit Court of Rock county, to compel the specific performance of a contract for the sale and conveyance of certain lands situated in said county. The defendant, at the time the bill was filed, resided in Brown county in the same state. The subpœna issued in the cause was sent to the sheriff of Brown county, who served the same in the usual manner on the defendant t his residence. A plea to the jurisdiction was thereupon interposed by the defendant, alleging that the suit should have been commenced in Brown county, and that the Circuit Court of Rock county had no power to send a subpœna to Brown county for service on the defendant residing there. The plea was sustained by the court below, and the complainant appealed. The court said:

"The only question presented by the record in this case is, whether the bill should have been filed in the county where the land is situated, or in the county where the defendant resides. It is believed that we can be but little aided by authority in deciding this question, but will have to rely upon general principles, and our particular statutes, so far as they bear upon the case. Where no rule of court or statute is provided to regulate our practice, it is governed by the rules of the High Court of Chancery in England. There the process runs throughout the realm, and the bill is filed with the register. In New York, if the suit is commenced before the chancellor, the bill is filed with the register or assistant register; if before the vice-chancellor, the bill is filed with the clerk of that circuit, without any reference to the county in which the defendant resides. As a general rule the suit should be instituted where the parties, or the subject matter of the suit may be situated.

"A suit for specific performance, like that of foreclosure, is of a twofold character, partly *in personam* and partly *in rem*. The court may enforce the contract, either by operating upon the person to compel a conveyance, or may pass the title of the land by decree. If the defendant is a non-resident, certainly the proper county in which to file the bill, would be that in which the land is situated; and it

would seem that as the sole object of the suit is to subject the specific property to the jurisdiction and control of the court, the county in which it is situated is the proper county in which to commence the suit, although the defendant may reside in another county in the State. There is nothing in the statute which precludes such practice; it is agreeable to the usual practice of courts of equity in other jurisdictions, is the most convenient and safe for all the parties, and ought to be sustained.

"Without any statute or rule of court, by the common usage of courts of chancery, the bill might be filed in cases of this kind, in the county where the land lay, and as there is no statute or rule of court restricting or forbidding this practice, we are of opinion that the plea to the jurisdiction was insufficient, and should have been overruled. Certainly personal service upon the defendant, in the State, is equivalent, at least, to publication of notice, as in case of non-resident; and no one doubts that in such case the bill could have been filed in Rock county. Does the accident of the defendant's residence in another county of the State, oust the Circuit Court of a jurisdiction which would otherwise be unquestionable? We think not."

In this connection it is appropriate to refer to the fact that in Clem *v.* Givens, 106 Va. 146, it was held that a suit may be brought in this state in the county where the land lay by a vendor against non-resident vendees for the specific execution of a contract for the sale of land, and the case matured upon an order of publication. And in the cases of McGavock *v.* Clarke, 93 Va. 110, and Grubs *v.* Starley, 90 Va. 832, it was held that suits for specific performance are proceedings *quasi in rem.*

In Collins *v.* Park, 93 Ky. 6, the syllabus is as follows:

"1. Venue of Action for Specific Execution of Contract for Sale of Land.—An action by the vendor to enforce specific execution of a contract for the sale of land for enforcement of his lien for the purchase money must be brought in the county in which the land is situated, and that court, having jurisdiction for the purpose of enforcing the contract, has jurisdiction also to render a personal judgment for the purchase money, although the defendant is not a resident of and has not been summoned in the county."

The only statute bearing on the case provided "that actions

for the sale of real property under a mortgage, lien, or other incumbrance or charge, except for debt of a decedent, must be brought in the county in which the subject of the action, or some part thereof is situated." Referring to this statute the court said:

> "As the land subject of the action is situated in Estill county, no other than the Estill Circuit Court could h ve rendered judgment for the sale of it under lien for purchase money, as prayed for in the petition. And having exclusive jurisdiction for that purpose, which, however, could not be intelligibly or equitably exercised without affording the defendant an opportunity to be heard, it would seem to follow the court did have jurisdiction to render personal judgment for the amount of purchase money found due, notwithstanding he was not a resident of nor summoned in Estill county."

All of which goes to show that such suits are, upon general principles, localized by the situs of the land.

In Henderson, etc. *v.* Perkins, 94 Ky. 207, 21 S. W. 1035, the syllabus is as follows:

> "1. Venue of Action to Enforce Contract for Sale of Land. —While an action to enforce a contract for the sale of the land is transitory, yet where the enforcement involves a sale of the land to satisfy a lien thereon, the action is localized, and must be brought in the county where the land lies."

To the same effect are the following cases: Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377; Epperly *v.* Furguson, 118 Iowa 47, 91 N. W. 816; Donaldson *v.* Smith et al., 122 Iowa 388, 98 N. W. 138, 139; Hall *v.* Gilman et al., 77 App. Div. 464, 79 N. Y. S. 307; Gartrell *v.* Stafford, 12 Neb. 545, 11 N. W. 732; Ensworth *v.* Holly et al., 33 Mo. 370; Parker *v.* McAllister, 14 Ind. 13, 14; Lindley *v.* O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 1 L. R. A. 79; Orr *v.* Thomas, 105 Kan. 624, 185 P. 1046.

Many of the authorities hold, and properly so, I think, that a suit for specific performance *may* be brought either in the county of the defendant's residence, or in the county where the land is located. Owens *v.* Hall, 13 Ohio St. 571; Burrow *v.* Clifton, 186 Ala. 297, 65 So. 58; 8 Elliott on Contracts, Supplement, section 2340.

The foregoing discussion has altogether to do with the case of a suit brought by a *vendor* against a vendee for the specific performance of the contract, in which there is necessarily involved an element of trust on account of the principles governing suits for specific performance as laid down in the beginning of this article. In such a case the question exists as to whether the complaining party may not have such peculiar interest in the property as to entitle him to the enforcement of a trust, and not of a contract merely, in which event the suit may be local and not altogether transitory. Where the suit is by the *vendee* and the complainant has neither stated in his pleadings, nor claimed before the court, such character or right, the inherent nature of the ordinary proceeding merely to compel a vendor to comply with his contract by the execution of a deed, may be considered altogether *in personam,* and so maintainable only where the defendant resides, and can be legally served with personal process. Close et al. *v.* Wheaton, 65 Kan. 830; 70 Pac. 891, Supreme Court of Kansas, Dec. 6, 1902; Welch *v.* Ladd (Okla.), 116 P. 573; Spur. *v.* Scorville, 3 Cush. (Mass.) 578; Merrell *v.* Beckwith, 163 Mass. 503, 40 N. E. 855; State *v.* Dist. Ct. of Pennington Co., 138 Minn. 336, 164 N. W. 1014.

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